United Asian Bank Bhd v Elgi Marka Sdn Bhd

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO 24–642–87
VINCENT NG J
24 NOVEMBER 1994

Land Law *— Charge — Order for sale — Land held under land office title — Order granted by High Court — Whether High Court has jurisdiction to grant order — Whether land administrator has exclusive jurisdiction — National Land Code 1965 ss 256 & 260*

Civil Procedure *— Judgments and orders — Order for sale — Order made by court in respect of land held under land office title a nullity — Whether aggrieved party should appeal or apply to set aside*

Civil Procedure *— Functus officio — Application to set aside order for sale — Order a nullity — Whether court functus officio*

This was an application by the defendant for an order for sale of a piece of land held under a land office title made pursuant to s 256 of the National Land Code 1965 ('the NLC') to be set aside with costs. The key issue which arose was whether the High Court is clothed with co-ordinate jurisdiction under s 260 of the NLC or any jurisdiction under s 256 to make an order for sale in respect of a land office title or whether the application should be made to the land administrator. The plaintiff also submitted that the defendant should have appealed against the said order for sale and that the court was functus officio.

Held, allowing the defendant's application:

(1) It is trite law that where a specific remedy given by a statute is clear and unambiguous, Parliament intended the remedy to be exclusive of any other mode of enforcing a right.

(2) Parliament had stated that the High Court may make an order for sale of land held under a registry title whereas applications for an order for sale of land held under a land office title shall be made only to the land administrator. The division of jurisdiction is crystal clear and neither body is intended to have co-ordinate or collateral jurisdiction on such matters. Thus the order for sale made pursuant to s 256 of the NLC was a nullity and devoid of any effect.

(3) Where an order is a nullity, an appeal against it is useless as despite any decision on appeal, such an order could be successfully attacked in collateral proceedings. In such an event, the person whom the order purports to affect has the option either of ignoring it or of going to court and asking for it to be set aside.

(4) The court was not functus officio as the order for sale was not a regularly obtained order since it was merely a purported order which was plainly null and void.

[Bahasa Malaysia summary

Ini merupakan satu permohonan oleh defendan supaya perintah jualan sebidang tanah yang dipegang di bawah surat hakmilik pejabat tanah yang telah dibuat mengikut s 256 Kanun Tanah Negara 1965 ('KTN') diketepikan dengan kos. Isu utama yang timbul adalah sama ada Mahkamah Tinggi diberikan bidang kuasa ko-ordinat di bawah s 260 KTN atau sebarang bidang kuasa di bawah s 256 untuk membuat satu perintah jualan berkenaan suatu surat hakmilik pejabat tanah ataupun sama ada permohonan itu seharusnya dibuat kepada pentadbir tanah. Plaintif juga berhujah bahawa defendan sepatutnya telah membuat rayuan terhadap perintah jualan itu dan bahawa mahkamah adalah functus officio.

Diputuskan, membenarkan permohonan defendan itu:

(1) Adalah undang-undang mantap bahawa apabila sesuatu remedi tertentu yang diberikan oleh statut jelas dan tidak taksa, tujuan Parlimen adalah supaya remedi itu mengecualikan mana-mana kaedah penguatkuasaan yang lain bagi sesuatu hak.

(2) Parlimen telah menyatakan bahawa Mahkamah Tinggi boleh membuat satu perintah jualan berkenaan tanah yang dipegang di bawah surat hakmilik pejabat pendaftaran manakala permohonan untuk satu perintah jualan berkenaan tanah yang dipegang di bawah surat hakmilik pejabat tanah mesti dibuat cuma kepada pentadbir tanah. Pembahagian bidang kuasa adalah amat jelas dan Parlimen tidak bertujuan memberikan mana-mana badan bidang kuasa ko-ordinat atau kolateral atas perkara tersebut. Oleh kerana itu, perintah jualan yang telah dibuat mengikut s 256 KTN adalah suatu pembatalan dan tidak berkesan sama sekali.

(3) Di mana suatu perintah itu adalah satu pembatalan, satu rayuan terhadapnya memanglah tidak berguna kerana tidak kira apa keputusan atas rayuan itu, perintah tersebut boleh dicabar dengan jayanya di dalam prosiding kolateral. Dalam keadaan sedemikian, orang yang kononnya patut merasai kesan perintah itu mempunyai pilihan sama ada tidak mengendahkannya atau pergi ke mahkamah dan memohon supaya perintah itu diketepikan.

(4) Mahkamah tidaklah functus officio kerana perintah jualan itu bukanlah satu perintah yang diperolehi mengikut aturan memandangkan yang ia cuma kononnya satu perintah yang jelasnya terbatal dan tidak berkesan.]

Notes

For cases on orders for sale, see 8 *Mallal's Digest* (4th Ed) paras 1111–1122.

For cases on judgments and orders, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2046–2051.

For cases on when a court is functus officio, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1409–1412.

Cases referred to

Eu Finance Bhd v Lim Yoke Foo [1982] 2 MLJ 37 (folld)

Hock Hua Bank Bhd v Sahari bin Murid [1981] MLJ 143 (refd)

Land Executive Committee of Federal Territory v Sykt Harper Gilfillan Bhd [1981] 1 MLJ 237 (folld)

Lim Yoke Foo v Eu Finance Bhd [1985] 1 MLJ 17 (refd)

Tan Teng Pan v Wong Fook Shang [1973] 1 MLJ 31 (folld)

Legislation referred to

National Land Code 1965 ss 256(1), (2), (3), 260(1), (2), 261(1)

K Selvarajan (*Kumar, Sitham & Co*) for the plaintiff.
Geeta Devi (*Geeta Padmanathan & Co*) for the defendant.

Vincent Ng J: This was an application under notis usul (encl 73) by the defendant for the order for sale dated 27 May 1991 (encl 41), of a piece of land situated in SPK5541 No Lot 2468 Mukim Sungai Petani, Kedah, made pursuant to s 256 of the National Land Code 1965 ('the Code') for the recovery of RM7,413,114.17 due and outstanding as at 27 May 1991 from the defendant to the plaintiff, to be set aside with costs. The application was based on the solitary ground that the High Court was not clothed with jurisdiction to make an order for sale in respect of a 'mukim' title.

It was not disputed that:

(a) The subject matter of the order for sale concerned a mukim or land office title which fell within the jurisdiction of the Kuala Muda District Land Administrator.

(b) The said order for sale made by the High Court was made under s 256 of the Code.

(c) This order was granted on 27 May 1991 after the court had heard both parties (who were then represented by counsel) in which the point concerning its lack of jurisdiction was not taken by the defendant, until now, over three years later.

(d) Though the defendant had appealed to the Supreme Court against the order for sale, it was not grounded on the question of jurisdiction and that appeal was struck off for want of prosecution.

This matter, which was argued before me on 10 October 1994, exclusively concerns my deliberation on the following issues in law. A

The first issue

The first issue is whether the High Court is clothed with co-ordinate jurisdiction under s 260 of the Code or any jurisdiction under s 256 of the Code, to make an order for sale in respect of a 'land office title or the form of qualified title corresponding to land office title'. B

Section 260(1) and (2) reads:

(1) This section applies to land held under — C

(a) Land Office title, or

(b) the form of qualified title corresponding to Land Office title,

and to any lease of any such land.

(2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Land Administrator in Form 16G. D

Whereas, s 256(1) and (2) states:

(1) This section applies to land held under —

(a) Registry title, or E

(b) the form of qualified title corresponding to Registry title,

and to any lease of any such land.

(2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure. F

Under s 5 of the Code, '"Court" means the High Court of Malaya'.

On the approach to take on interpretation of the provisions of the Code, I am guided by the dicta of Raja Azlan Shah LP in *Land Executive Committee of Federal Territory v Sykt Harper Gilfillan Bhd* [1981] 1 MLJ 237, who had this to say [at p 237]: G

> As a general rule where a statute creates a new obligation and provides a special mode of enforcing it, no other court has jurisdiction to enforce that obligation. The case generally referred to, as establishing that rule is *Pasmore v Oswaldtwistle Urban District Council* [1898] AC 387. We quote from the speech of the Earl of Halsbury LC: H
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> > 'The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe v Bridges* 1 B & Ad 847 at p 859. He says: "where an Act creates an obligation and enforces the performance in a specified manner, we take it to be a general rule I

A that performance cannot be enforced in any other manner". The words which the learned judge, Lord Tenterden, uses there appear to be strictly applicable to this case. The obligation which is created by this statute is an obligation which is created by the statute and by the statute alone. It is nothing to the purpose to say that there were other statutes which created similar obligations, because all those statutes are B repealed; you must take your stand upon the statute in question, and the statute which creates the obligation is the statute to which one must look to see if there is a specified remedy contained in it. There is a specified remedy contained in it, which is an application to the proper Government department.'

C In *Barraclough v Brown & Ors* [1897] AC 615, Lord Herschell said at p 619:

'The only right conferred is "to recover such expenses from the owner of such vessel in a court of summary jurisdiction". I do not think the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right.'

D His Lordship concluded thus:

Reading s 418 of the Code, we are satisfied that the latter is the correct interpretation. Having regard to the special provision for limiting the time within which to enforce the right, the indications are that Parliament has by using plain and unambiguous language intended the right to be exclusive of E any other mode of enforcing it ...

For these reasons we are of the view that the court has no jurisdiction to entertain the claim sought by the declaration and the appeal must be allowed with costs here and below.

It is thus trite law that where a specific remedy given by a statute is clear F and unambiguous, Parliament intended the right to be exclusive of any other mode of enforcing it; the court's jurisdiction is only as prescribed within the four corners of the statutory provision and it is to such a provision that one must look to exclusively for the remedy sought.

Turning to the issue raised in our current case, Parliament had in G plain and unambiguous language stated that the High Court may make an order for sale of a registry title or a qualified title corresponding to a registry title whereas in contradiction states that an application for an order for sale of a land office title or a qualified title corresponding to a land office title shall be made (only) to the land administrator. The division of jurisdiction is thus crystal clear and neither body is intended to H have co-ordinate or collateral jurisdiction on such matters. This provision of the Code cannot be circumvented and the court is not clothed with any inherent jurisdiction on such matters where a provision is clear. Thus, in the case of *Tan Teng Pan v Wong Fook Shang* [1973] 1 MLJ 31, it was held that in view of the provisions of ss 260 and 261(1) of the Code, the High I Court had no jurisdiction to entertain the application by the chargee for an order for sale of land held under EMR in the Mukim of Klang, as that application should have been made to the Collector of Land Revenue Klang.

Applying the above principle, I held that the order for sale dated 27 May 1991 made pursuant to s 256 of the Code was a nullity and devoid of any effect (see also *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37, a decision confirmed by the Privy Council in *Lim Yoke Foo v Eu Finance Bhd* [1985] 1 MLJ 17).

The second issue

The second issue is that when the order for sale was made, the parties were represented by counsel and the point concerning the court's jurisdiction was not taken until now, over three years later.

In my view, such objections have no relevance in a situation where a purported order was no order at all for being a nullity and devoid of any effect and particularly where it is not open to the court to exercise any discretion or to adjudicate further on the matter.

The third issue

The third issue is that the defendant should have appealed against the said order for sale. Here again, the short and apt answer to this appears in the judgment of Abdoolcader J in *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 wherein he had this to say at p 39:

> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings the court may declare an act that purports to bind to be non-existent. In *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729 at p 736, Lord Diplock LJ said (at p 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.
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> Where a decision is null by reason of want of jurisdiction, it cannot be cured in any appellate proceedings; failure to take advantage of this somewhat futile remedy does not affect the nullity inherent in the challenged decision. The party affected by the decision may appeal 'but he is not bound to (do so), because he is at liberty to treat the act as void' (*Birmingham (Churchwardens and Overseers) v Shaw* (1849) 10 QB 868 at p 880 per Denman CJ). In *Barnard v National Dock Labour Board* [1953] 2 QB 18 at p 34 it was said that, as a notice of suspension made by the local board was a nullity, 'the fact that there was an unsuccessful appeal on it cannot turn that which was a nullity into an effective suspension' (per Singleton LJ). *Ridge v Baldwin* [1964] AC 40 is to the same effect.
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> Lord Denning said in *Director of Public Prosecutions v Head* [1959] AC 83 at p 111 that if an order was void, it would in law be a nullity and there would be no need for an order to quash it as it would be automatically null and void without more ado. Lord Denning as Master of the Rolls so held too in *R v Paddington Valuation Officer & Anor, ex p Peachey Property Corp Ltd (No 2)* [1966] 1 QB 380 at p 402.

A *The fourth issue*

The fourth issue is that the court was functus officio, based on the principle enunciated in *Hock Hua Bank Bhd v Sahari bin Murid* [1981] MLJ 143 where it was held that the court had no power under any application in the same action to alter, vary or set aside a judgment B regularly obtained after it had been entered or an order after it had been drawn up, except under the slip rule, so far as is necessary to correct errors in expressing the intention of the court, unless it is a judgment by default or made in the absence of a party at a trial or hearing.

Here again, the short answer to this contention is that the order for C sale dated 27 May 1991 was not a regularly obtained order, as it was merely a purported order which was plainly null and void under the aforesaid settled authorities.

For the above reasons, I allowed the application in terms of encl 73 (as amended) and set aside the order for sale dated 27 May 1991, save that as the facts disclose that the plaintiffs have already suffered some D considerable loss due to no fault of theirs, I made no order as to costs.

Application allowed.

Reported by Kevin Ooi

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